TENGKU ANOOMSHAH BIN TENGKU ZAINAL ABIDIN & ANOR.

v.

COLLECTOR LAND REVENUE, NORTH-EAST DISTRICT, PENANG & ANOR.

HIGH COURT MALAYA, PENANG
TUAN VINCENT NG KIM KHOAY J
[ORIGINATING SUMMONS NO. 24-82-95]
4 APRIL 1995

ADMINISTRATIVE LAW: *Plaintiffs administrators of deceased's estate - Government acquired deceased's land in 1953 - Compensation for acquisition awarded by the Collector paid to the estates' then executor in 1954 - Plaintiffs applying for extension of time to apply for leave to apply for order of certiorari to quash award - Whether permissible - Consideration of O. 53 r. IA of the Rules of the High Court 1980 - Whether delay in making the application satisfactorily explained.*

The plaintiffs are the lawful administrators of the estate of one Tunku Baharuddin bin Tumonggong (the deceased). In 1953 the Government compulsorily acquired a piece of land belonging to the deceased. Pursuant to the award of the Collector, the then executor of the estate of the deceased was paid the compensation for the acquisition of the land.

The plaintiffs now apply to be allowed an extension of two weeks to apply for leave to apply for an order for certiorari to quash the said award of the Collector.The question that arose was whether the plaintiffs had sufficiently explained, to the Court's satisfaction, their delay in making the application, as under O. 53 r. 1A of the Rules of the High Court 1980 (RHC 1980) the plaintiffs had only six weeks from the date of the acquisition /award within which to apply for an order of certiorari.

Held:

[1] There was no explanation, satisfactory or otherwise, from the plaintiffs, for their delay in making the application, save for their averment in paragraph 16 of enclosure 2 which stated that the plaintiffs were issued a grant of letters of administration *de bonis non* to the said estate on 24 May 1993. However, this averment would still fall short of, and could not constitute an explanation for the delay of around 40 years in the issue of the said grant of letters of administration and the making of the application was also not explained.

[2] Bereft of a satisfactory explanation from the plaintiffs, the Court should not exercise and is precluded from exercising its discretion in their favour to allow them the extension of time requested. In the circumstances the current application is clearly without legal merits.

[3] In any event, even if the plaintiffs had obtained the extension of time sought, they could not succeed in securing an order of certiorari, especially taking into account the fact that they had accepted the said declaration, acquisition and award which was a completed exercise of statutory power by the State; there was grossly inordinate delay on their part in challenging the declaration, acquisition or award and, there does not appear to be adequate equitable legislative safeguards in both the old Ordinance and the new Act to preclude unwarranted land acquisitions in breach of the declared "public purpose".

Obiter Dictum:

Though the Court has an unfettered discretion to grant or refuse an extension of time, the Rules of Court must *prima facie* be obeyed; and in order to justify an extension of time, there must be some material on which the Court can exercise its discretion in favour of the

applicant. Otherwise the party in breach of the Rules would have an unfettered right to extension of time which would defeat the very purpose and object of the rules of limitation of periods.

[Plaintiffs' application dismissed with costs]

Cases referred to:

Pemungut Hasil Tanah Daerah Barat Daya, Penang v. Kam Gin Paik & Ors. [1986] 1 MLJ 362 ***(dist)***

*United Asian Bank v. Elgi Marka Sdn. Bhd. [1995] 1 MLJ 301****(refd)***

Land Execution Committee of Federal Territory v. Syarikat Harper Gilfillan Bhd. [1981] 1 MLJ 237 ***(refd)***

Eu Finance Bhd. v. Lim Yoke Foo [1982] 2 MLJ 37 ***(refd)***

Birmingham (Churchwardens and Overseers) v. Shaw [1989] 10 QB 868; 116 ER 329 (at p. 880) ***(refd)***

Barnard v. National Dock Labour Board [1953] 2 QB 18 ***(refd)***

Ridge v. Baldwin [1964] AC 40 ***(refd)***

*States of H.P. v. Jai Dev Ram [1984] 2 SLJ 14; [1984] 2 SLR 411 (HP)****(refd)***

Yew Lean Finance Development (M) Sdn. Bhd. v. Director of Lands and Mines, Penang [1977] 2 MLJ 45 ***(refd)***

Secretary of State for India in Council v. Akbar Ali [1923] ILR 14 Allahabad 443 ***(refd)***

Lee Gee Lam v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor. [1993] 2 AMR 37 p. 2137 ***(refd)***

Central Electricity Board v. Commissioner of the Federal Capital and Anor.; Insurance Company of North America - 3rd Party [1967] 2 MLJ 161 ***(refd)***

Ong Guan Teck & Ors. v. Hijjas [1982] 1 MLJ 105 ***(foll)***

Mersing Omnibus Co. Sdn. Bhd. v. Minister of Labour & Manpower & Anor. [1983] 2 MLJ 54 ***(refd)***

Re: Sarjit Singh Khaira [1990] 3 MLJ 415 ***(refd)***

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, s. 11C(1)
Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 7C
Internal Security Act, s. 8B(1)
Land Acquisition Ordinance 1960, ss. 3, 3(a), (b), (c), 5, 7, 8, 8(3)
Rules of the High Court 1980, O. 53 r. 1A

For the plaintiffs - Karpal Singh (Jagdeep Singh Deo with him); M/s. Karpal Singh & Co.
For the defendants - Ruzima bin Ghazali, Asst. to State Legal Adviser (Marzidy bin Syed Marzuki, FC, with him)

JUDGMENT

Vincent Ng Kim Khoay J:

The plaintiffs are the lawful administrators of the estate of Tunku Baharuddin bin Tumonggong @ Tunku Baharuddin bin Koomis @ Baharuddin bin Kumis @ Baharuddin bin Tunku Kumis @ Baharuddin bin Tunku Mis @ Phya Phuminath Phakdi (hereinafter referred to as the said estate).

On 22 October 1953 the High Commissioner in Nominated Council of Penang by Government Gazette (No. 379 dated 25 September 1953 and published in the Straits Settlement Section Government Gazette dated 22 October 1953) made a declaration (the Declaration) under s. 5 of the then Land Acquisition Ordinance (SS Chapter 128), (the Ordinance) that the piece of land known as Lot 127, TS8, North-East District, Penang (the said land) was to be acquired for a public purpose, namely, 'Housing Project'. At the time of the declaration referred to in

para. 5 herein, the registered owner of the said land was one Tunku Baharuddin bin Tumonggong @ Tunku Baharuddin bin Koomis @ Baharuddin bin Kumis @ Baharuddin bin Tunku Mis @ Phya Phuminath Phakdi on whose estate's behalf the plaintiffs as administrators had commenced this action. On the said land stood 'Rumah Tunku Kudin' or 'Udini House' which, according to the plaintiffs, after possession had been taken by the Collector, had been "left unattended and has, as a result of being exposed to the elements, deteriorated into a dilapidated state and, consequently being unfit for human habitation; and what was once a majestic structure is now in sorrowful ruins".

The Collector, North-East District, Penang pursuant to proceedings under s. 10 of the Ordinance paid to M/s. Conaghan, Wreford and Thornton, advocates & solicitors, on 14 January 1954 for and on behalf of Tunku Ibrahim bin Tunku Abdullah (the then executor of the said estate) a sum of RM144,960.40, pursuant to and being the award made on 19 December 1953 by the Collector, North-East District, Penang (the said award) in respect of compensation for acquisition of the said land. After the said award was made, possession of the said land was taken by the Collector, North-East District, Penang pursuant to s. 15 of the Ordinance (SS Chapter 128).

It is not disputed that upon Merdeka, the first and second defendants had taken over all obligations and liabilities from the High Commissioner in Nominated Council, Penang and the Collector, North-East District, Penang, the acquiring authority, prior to Merdeka.

Before me, the plaintiffs had applied, *inter alia*, (under encl. 1) to be allowed an extension of two weeks to apply for leave to apply for an order of *certiorari* to quash the said award. Mr. Karpal Singh for the plaintiffs, citing various commentaries on the Court's exercise of discretionary jurisdiction under Art. 226 of the Constitution of India, had contended that "the paramount consideration of the Court is to render justice in essence and spirit" and hence there cannot be any bar of limitation. And thus, this Court should exercise its discretion to grant the extension of time sought as:

(a) The plaintiffs were issued letters of administration *de bonis non* only on 24 May 1993; and,

(b) The plaintiffs had a good cause for quashing the said award, as the acquiring authority before Merdeka and the defendants since Merdeka had failed and/or neglected to execute the public purpose for which the said land was acquired, namely "for housing project". On this ground, the plaintiffs had contended in paras. 11, 12, 13 and 15 of their affidavit dated 2 February 1995 (encl. 2) that, to quote: "the non-utilisation of the said land for the past forty-one years, namely Housing Project, is in contravention of the law which, in effect, means that the declaration No. 379 dated 25 September 1953 published in the Straits Settlement Section Government Gazette of 22 October 1953 was made in contravention of statutory requirement and did not constitute a valid exercise of power by the initial acquiring authority, and the defendants subsequently. It must follow, consequently, that the award dated 19 December 1953 is invalid and, cannot in law, be supported and ought, therefore, to be set aside." On the facts, they further averred that it is inconceivable why the Housing Project had not been effected on the said land with dispatch after acquisition way back in 1953 or 1954, having regard to the then exigencies which prompted the acquisition; and the plaintiffs were thus advised that, again to quote: "any execution of a Housing Project on the said land after an unexplained and, in any event, inordinate delay after acquisition thereof for that purpose must, inevitably in law, mean there has been a fraud upon the relevant land acquisition

legislation and the said estate would suffer collosal loss with the defendants securing unjust enrichment of Herculean magnitude if there is no judicial intervention to put matters legally and logically right".

It is not disputed that the defendants had not executed the public purpose for which the said land was acquired namely, Housing Project, and indeed, since the acquisition until now, there was no development whatsoever on the said land.

The Ordinance under which the said land was acquired came into effect on 13 December 1920. This Ordinance was replaced by the Land Acquisition Act of 1960 (the Act). Under the Ordinance, the Governor in Council may acquire any particular land by making a declaration under s. 5 (of the Ordinance) that that particular land is needed for a public purpose, or for a company and such declaration shall be conclusive evidence that that land is needed for a public purpose or for a company. Whereas, the power of the State under the Act (as amended) is significantly enlarged, as s. 8 read with s. 3 of same empowers any State authority who, decides that a particular piece of land from a plan and list prepared under s. 7 of the Act is needed:

(a) for any public purpose;

(b) by any person or corporation for any purpose which in the opinion of the State Authority is beneficial to the economic development of Malaysia or any part thereof or to the public generally or any class of the public; or

(c) for the purpose of mining or for residential, agricultural, commercial or industrial purposes,

to make a declaration, to be published in the Gazette, to the effect that the land is needed for the purpose specified in s. 3(a), (b) or (c). Under s. 8(3), such declaration shall be conclusive evidence that that land referred to is needed for the purpose specified therein. And, under s. 3(c) above the State Authority need not satisfy the "public purpose" test in a proposed acquisition exercise thereunder - "public purpose" and public interest test being surely the essential linchpin criteria in any State enterprise which have the serious effect of the enforced divestment of the citizens' constitutional right of ownership of land.

It is also further noted that the old Ordinance contained a provision, under Part VII, which reads that the provisions of s. 5 shall not be put into effect in order to acquire land for any company, without the previous consent of the Governor in Council, and such consent shall not be given unless the Governor in Council is satisfied by enquiry held that such acquisition is needed for the construction of some work and that such work is likely to prove useful to the public. There is no such similar provision in the new Act. And, it is also to be noted that both the old Ordinance and the new Act contain neither provisions nor procedure to enable a landowner to challenge the Declaration of the State Authority that the land is needed for public purpose: that is, to challenge the acquisition itself. Under s. 18(3B) of the old Ordinance and s. 38 of the new Act, an aggrieved landowner may only challenge the Collector's Award in terms of measurement of land, the amount of compensation, the persons to whom it is payable or the apportionment of compensation.

Section 18(3B) of the old Ordinance provided that, any person who is dissatisfied with the award **and who has not accepted the Award** may require the matter be referred by the Collector for the determination of the Court - if he was present or represented before the Collector at the time when he made the award, within six weeks from the date of the award, or if he was not so present, then within six weeks from the date of receipt of the notice from the Collector, or within 12 months from the date of the Collector's award whichever period shall first expire.

Section 38 of the new Act makes similar provision in this regard, save that the aforesaid 12 months' period from the date of the Collector's award within which time the applicant has to require the matter to be referred to the High Court under the Ordinance, has been reduced to six months under the Act. The plaintiffs did not refer the award to the Court within the twelve-month period, prescribed in s. 18(3B) of the Ordinance, and indeed the representatives of the said estate had accepted the award by accepting the sum of RM144,960.40 through their solicitors, as admitted in para. 7 (encl. 2) of their supporting affidavit.

Thus, the time limited by the Ordinance to enable the then administrators of the estate and the plaintiffs to challenge the award in the High Court had expired over a human generation ago. Indeed, the relief now sought, if viewed in the light of the norms of legal time frame, concerned quite a fossilized and calcified but perfected exercise of statutory power by the State, in which the pertaining award, a *fortiori*, had been accepted by the then personal representatives of the said estate. However, there being no provision to challenge the declaration or acquisition itself, and not having challenged the award within the time limited by law, the plaintiffs have now sought nevertheless to challenge same (and by implication - from the tenor of pleadings - also the declaration and acquisition itself) by way of certiorari and through this ingenious process of seeking an extension of time to apply for leave to apply for an order of *certiorari*; though I must also hasten to add here that under the Rules of the High Court 1980, in a proper case, they are well within their rights to take this route in their attempt to seek relief, in so far as the award is concerned.

On the merits, it is not seriously contended by the plaintiffs that the said declaration or acquisition/award was void *ab initio* but rather, the complaint in essence, was based on their contention that, due to the subsequent conduct of the acquiring authority, the declaration, acquisition and award became voidable as "there has been a fraud upon the relevant land acquisition legislation", by virtue of the hitherto non-carrying out the specifically declared purpose of the said acquisition. It may perhaps be commented that the proper forum for the plaintiffs to canvass this complaint is Parliament with the view to effect legislative reform or to rectify shortcomings.

It is trite law - considering the established case authorities - that had the said acquisition been void *ab initio*, then, as it is a nullity it is immaterial whether the act of the acquiring authority sought to be impugned by the plaintiffs, occurred one or two human generations ago, as time does not start to run in the case of an invalid exercise of power. This principle was enunciated in the celebrated Privy Council case of *Pemungut Hasil Tanah Daerah Barat Daya, Penang v. Kam Gin Paik & Ors*. [1986] 1 MLJ 362, cited by Mr. Karpal Singh, in which, to his credit, he himself appeared. In that case, it was held that the whole acquisition exercise was void *ab initio* due to contravention of statutory requirements, and did not constitute a valid exercise of power. The reason being that there was a delay of 7 years between the publication of the s. 8 declaration and the holding of the inquiry by the Collector. As such, this authority is of no assistance to the current plaintiffs' case. It is noteworthy that the law laid down in *Kam Gin Paik & Ors.* (*supra*) accords with the rationale employed by the Courts in a line of authorities on the issue of void orders made by the Courts. See my decision in *United Asian Bank v. Elgi Marka Sdn. Bhd.* [1995] 1 MLJ 301; see also *Land Execution Committee of Federal Territory v. Syarikat Harper Gilfillan Bhd.* [1981] 1 MLJ 237, *Eu Finance Bhd. v. Lim Yoke Foo* [1982] 2 MLJ 37 (a decision confirmed by the Privy Council in *Lim Yoke Foo v. Eu Finance Bhd.* [1985] 1 MLJ 17), *Birmingham (Churchwardens and Overseers) v. Shaw* [1989] 10 QB 868; 116 ER 329 (at p. 880) per Denman CJ), In *Barnard v. National Dock Labour Board* [1953] 2 QB 18 and *Ridge v. Baldwin* [1964]

AC 40. In India, similar law prevails and an order which is void does not require to be set aside and the bar of limitation is not attracted. See *States of H.P. v. Jai Dev Ram* [1984] 2 SLJ 14: [1984] 2 SLR 411 (HP).

On the question of the merits of challenging the declaration, acquisition or award, strenously canvassed by Counsel for the plaintiffs, it is highly pertinent to note that both, the Ordinance as well as the Act contained no provisions to make a valid (or not void) declaration and acquisition/award by the Collector under s. 5 of the Ordinance and s. 8 of the Act, voidable on the grounds of the State's subsequent conduct, of non-carrying out of the specifically declared purpose of the acquisition itself i.e. there are no provisions in both the new and old legislations to make voidable, a declaration or acquisition/award which is not void *ab initio*.

Further (on the issue of merits), it was held by Arulanandom J in *Yew Lean Finance Development (M) Sdn. Bhd. v. Director of Lands and Mines, Penang* [1977] 2 MLJ 45 - following the Indian authority of *Secretary of State for India in Council v. Akbar Ali* [1923] ILR 14 Allahabad 443 - that the State Government was the sole authority to decide what is, or, what is not, a public purpose and its decision in this respect could not be questioned by a Civil Court. Though, in this regard, it is perhaps pertinent to observe that the Ordinance and the Act contain no provision (save in the manner expressed in s. 8(3) of the Act) - similar to s. 7C of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 8B(i) of the Internal Security Act and s. 11C(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985. (See my decision in *Lee Gee Lam v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor.* [1993] 2 AMR 37 p. 2137 - which would expressly oust the Court's jurisdiction to question or to review the decision or opinion of the acquiring authority that a land to be acquired is for a public purpose, or is "beneficial to the development of Malaysia ... or to the public generally or to any class of the public or ... for residential purposes ..."

Be that as it may, this Court would be falling into error should it fail to recognise that by virtue of the nature of the application before me, I am precluded from considering the merits of the intended application for leave to issue an order of certiorari. My function here is solely to consider the plaintiffs' grounds on their application for extension of time to make their application for leave to apply for an order of certiorari, and not their merits for an order of *certiorari* as vigorously canvassed in their ground (b) above.

On general principles, this Court has no inherent jurisdiction to extend time except where such power is expressly given to it under the provision of the law. See *Central Electricity Board v. Commissioner of the Federal Capital and Anor.; Insurance Company of North America - 3rd Party* [1967] 2 MLJ 161. However, the words "or, ... except where the delay is accounted for to the satisfaction of the Court or Judge to whom the application for leave is made" in O. 53 r. 1A, which deals with such applications, would sufficiently clothe the Court with powers to extend time to enable an aggrieved party to apply for leave to issue an order of certiorari. But though the Court has an unfettered discretion to grant or refuse an extension of time, the rules of Court must *prima facie* be obeyed; and in order to justify an extension of time, there must be some material on which the Court can exercise its discretion in favour of the applicant. For otherwise the party in breach of the rules would have an unfettered right to extension of time which would defeat the very purpose and object of the rules of limitation of period. See *Ong Guan Teck & Ors. v. Hijjas* [1982] 1 MLJ 105.

Order 53 r. 1A of the Rules of the High Court, 1980, provides that leave to apply for an order of certiorari shall not be granted "unless the application for leave is made within six weeks after the date of the proceeding or the delay is accounted for to the satisfaction of the Court or Judge to whom the application was made." See *Mersing Omnibus Co. Sdn. Bhd. v. Minister of Labour & Manpower & Anor.* [1983] 2 MLJ 54. See also *Re: Sarjit Singh Khaira* [1990] 3 MLJ 415. As such, under O. 53 r. 1A, the plaintiffs had only six (6) weeks period from the date of the acquisition/award within which to apply for leave to apply for an order of certiorari.

Hence, in this current application, the Court is enjoined under O. 53 r. 1A to consider whether the plaintiffs' had sufficiently explained to the Court's satisfaction, their delay in making this application. I find no such explanation from the plaintiffs, satisfactory or otherwise, for their delay in making this application, save only obliquely and by implication, in their averment in para. 16 of encl. 2, which stated that the plaintiffs were on 24 May 1993 issued a grant of letters of administration *de bonis non* (with a will annexed) to the said estate. However, this averment in para. 16 would still fall short of, and could not constitute an explanation for the delay of around 40 years in the issue of the said grant of letters of administration to them. Even then, considering the six (6) weeks allowed to the plaintiffs, the considerable delay of about 1 year 9 months since issuance of the said letters of administration before they made this application was also not explained. Thus, bereft of a satisfactory explanation from the plaintiffs, this Court should not exercise, and is precluded from exercising its discretion in their favour to allow them the extension of time requested. The current application is clearly without legal merits - quite distinct from moral merits which often, but do not necessarily always accord with legal merits.

In any event, even if this Court had been minded to allow the plaintiffs the extension of time sought, I cannot see how they could succeed, on merits, in securing an order of certiorari, considering that: they have accepted the said declaration, acquisition and indeed, award which was a completed exercise of statutory power by the State; there was grossly inordinate delay on their part in challenging the declaration, acquisition or award; and, there does not appear to be adequate equitable legislative safeguards in both the old Ordinance and the new Act, to preclude unwarranted land acquisitions in breach of the declared "public purpose", as had apparently happened in this case, albeit during the Colonial period.

For all the above reasons adumbrated above, I dismissed the plaintiffs' application herein with costs to the defendants.